Turnbull Enterprises, Inc. *and* Sheet Metal Workers International Association, Local No. 11. Case 15-CA-7489

January 7, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 18, 1980, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,[1] the Charging Party filed cross-exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision. The Intervenor[2] also filed an answering brief to the exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order, which is modified to reflect the amended remedy.

AMENDED REMEDY

The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing payment of contributions to the New Orleans Sheet Metal Workers Health and Welfare Fund (hereinafter referred to as the Health and Welfare Fund or the Fund) on behalf of the unit employees. To remedy this violation, the Administrative Law Judge recommended that Respondent be ordered, *inter alia*, to make all Health and Welfare Fund contributions, as provided in the predecessor's collective-bargaining agreement, for the period beginning on July 10, 1979, and extending until agreement on a contract encompassing a substitute insurance plan was reached by the parties on December 12, 1979;[4] to make whole employees for loss of benefits after the expiration of the coverage provided by these retroactive contributions or, at Respondent's discretion, by continuing contributions to the Fund beyond December 12 in lieu of compensating employees for loss of benefits under the Fund; and to rescind the insurance plan in effect under its collective-bargaining agreement with the Union and reinstate the New Orleans Sheet Metal Workers Health and Welfare Fund plan for unit employees upon written request by the Union. The Administrative Law Judge left to the compliance stage the question whether Respondent must pay any additional amounts into the Health and Welfare Fund in order to satisfy the make-whole remedy, but specifically provided that Respondent be required to notify bargaining unit employees, as well as former employees, qualifying for benefits under this remedial scheme of their entitlement to such benefits. We agree with certain portions of the Administrative Law Judge's recommended Order, but shall modify it in other respects to best effectuate an appropriate remedy under the existing circumstances.

In cases, like the one here, involving a violation of Section 8(a)(5) based on a respondent's unilaterally altering existing benefits, it is the Board's established policy to order restoration of the *status quo ante* to the extent feasible where there is no evidence that to do so would impose an undue or unfair burden on the respondent.[5] Because the Fund's health and welfare plan provided for 6 months' future benefits on the basis of coverage earned during the previous 6 months, and contributions had been made by Respondent's predecessor on the unit employees' behalf, the employees had accrued 6 months of advance coverage at the time that Respondent acceded to its successorship obligations and unilaterally discontinued payments to the Fund.[6] We find, therefore, that Respondent's unfair labor practice can be most appropriately remedied by placing the parties in the position in which they would have been but for Respondent's unlawful discontinuance of Fund contributions.

The remedy recommended by the Administrative Law Judge generally accomplishes this remedial objective. Thus, we agree with his recommendations regarding making employees whole for loss of benefits to the extent that costs which would have been paid by the Fund were not actually paid by

[1] Respondent's request for oral argument is hereby denied inasmuch as the record and briefs adequately state the positions of the parties.

[2] The New Orleans Sheet Metal Workers Health and Welfare Fund appeared at the hearing as the Intervenor.

[3] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[4] Unless otherwise indicated, all dates hereinafter are 1979.

[5] See, for example, *Allied Products Corp., Richard Brothers Division*, 218 NLRB 1246 (1975), enfd. in relevant part 548 F.2d 644 (6th Cir. 1977); *Southland Paper Mills, Inc.*, 161 NLRB 1077, 1078 (1975).

[6] Under the terms of the plan, unit employees of the predecessor who worked at least 350 hours between January 1, 1979, and June 30, 1979, were qualified for benefits under the Fund from July 1, 1979, through December 31, 1979, regardless of whether Respondent made contributions.

the insurer under the contract, notification to all qualifying employees and former employees of their entitlement to such amounts, and reinstatement of the Health and Welfare Fund upon the Union's written request. We find, however, that the Union is most efficaciously restored to the bargaining position which it would have enjoyed but for Respondent's discontinuation of Fund contributions, not by requiring that Fund contributions be made for the period beginning July 10, 1979, and extending until December 12, 1979, as recommended by the Administrative Law Judge, but rather by the payment of retroactive contributions which will purchase 6 months of future coverage for the employees commencing from the day following receipt of the Union's request that the Health and Welfare Fund plan be reinstituted.[7] Respondent will then be required to continue payment of the currently applicable contribution rate of the New Orleans Sheet Metal Workers Health and Welfare Fund sufficient to provide continuing coverage for the unit employees until it fulfills its bargaining obligation.

In order to allow the Union an opportunity to consider whether to request the reinstatement of the Health and Welfare Fund, while not leaving the matter open indefinitely, the Union shall be required to request reinstatement within 20 days of the date of our Order herein, and if the Union does not request such reinstatement then the insurance plan in effect under the parties' current collective-bargaining agreement shall remain in effect. Once all unit employees employed by Respondent on the effective date of the reinstatement of coverage under the Health and Welfare Fund are covered by that plan, Respondent may discontinue the payment of premiums on their behalf to the insurer providing coverage under the parties' collective-bargaining agreement.[8]

In agreement with the Administrative Law Judge, we are not requiring Respondent to pay double insurance premiums by making all Health and Welfare Fund contributions for the entire period since July 10, 1979. Requiring full Fund contributions would impose an undue burden on Respondent. Further, such payments would constitute a windfall to the Health and Welfare Fund inasmuch as the insurer under the parties' collective-bargaining agreement has presumably already paid a substantial portion of the benefits to which employees would be entitled during this period.

We shall, however, order Respondent to compensate the Fund for administration costs and other expenses and loss of interest incurred by the Fund as a result of its acceptance of retroactive payments. Like the Administrative Law Judge, we shall leave the determination of these amounts to further compliance proceedings, should the Union request reinstatement of the Fund. *Clerks and Checkers Local No. 1593, International Longshoremen's Association, AFL-CIO (Caldwell Shipping Company, et al.)*, 243 NLRB 8 (1979).[9]

Irrespective of whether the Union requests reinstatement of the Health and Welfare Fund plan, we shall adopt the Administrative Law Judge's recommendation that specific unit employees who suffered actual damage in loss of benefits be made whole by recovering those damages. In measuring actual damages, employees should be reimbursed for actual cost to the extent those costs would have been paid by the Fund minus costs which were actually paid by Respondent's insurer. However, we do not adopt those aspects of the Administrative Law Judge's recommended make-whole provision which permit Respondent to elect to make contributions to the Health and Welfare Fund in lieu of compensating employess for loss of benefits under the Fund. Rather, we shall require that employees be made whole for loss of benefits after December 31, 1979, the point at which their Health and Welfare Fund coverage ceased, and continuing to the date upon which Respondent fully complies with the terms of our Order. The amounts due shall be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Further, since this remedy has the effect of qualifying all persons employed in the bargaining unit

[7] Since the Respondent made no payments for its unit employees' insurance coverage from July 10 to December 12, erroneously assuming that it had a "six-month free ride," these amounts represent a substitution for contributions which should have been made at that time.

[8] In order to establish initial eligibility for Fund benefits, an employee must work 6 consecutive months with 700 hours of contributions to the Fund. Once the initial eligibility requirement is satisfied, employees who have 350 hours of contributions in each 6-month period remain eligible for benefits. Should any employee have been hired shortly prior to the date Fund coverage becomes effective pursuant to this remedy, such individuals might not qualify for Fund benefits until up to 6 months later. Therefore, to avoid the possibility of individuals hired under the current collective-bargaining agreement being left with no insurance coverage during this interim period, we shall require Respondent to continue to make premium payments on such individuals' behalf until such time as each qualifies for coverage under the Fund plan.

[9] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make-whole" remedy. We therefore leave to further proceedings the question of how much interest Respondent must pay into the benefit fund in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213, fn. 7 (1979).

after July 10, 1979,[10] for benefits under the Health and Welfare Fund, we, in accordance with the recommendation of the Administrative Law Judge, shall require that Respondent take appropriate action to notify, in writing, all employees and former employees that so qualified of their entitlement to those benefits.

The above-described remedial provisions, in our view, best eradicate the effects of Respondent's unlawful conduct by making whole employees for their resulting losses, and best restore the *status quo ante* by placing the Union in the bargaining position which would have obtained but for Respondent's unlawful action, without imposing an undue or unfair burden upon Respondent.[11] We shall modify the Administrative Law Judge's recommended Order accordingly.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Turnbull Enterprises, Inc., Gulfport, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following paragraphs for paragraphs 2(a) and (b):

"(a) Make whole the employees in the appropriate unit in the manner set forth in the section of the Board's Decision and Order entitled 'Amended Remedy.'

"(b) Upon written request from the Union, and in the manner set forth in the section of the Board's Decision and Order entitled 'Amended Remedy,' rescind the current insurance plan under its collective-bargaining agreement with the Union, and immediately reestablish the plan under the New Orleans Sheet Metal Workers Health and Welfare Fund by making retroactive contributions on behalf of unit employees entitling them to 6 months of future coverage commencing from the day following receipt of the Union's request, and continue such payments until such time as Respondent negotiates in good faith with the Union to a new agreement or impasse."

2. Insert the following as paragraph 2(c):

"(c) Notify, in writing, all persons employed in the bargaining unit after July 10, 1979, of their entitlement to damages for loss of benefits."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT, without prior consultation and bargaining with the Union, effect any changes in established terms and conditions of employment of the employees in the appropriate unit described below by unilaterally discontinuing payments to the Health and Welfare Fund as set forth in the collective-bargaining agreement between our predecessor and the Union.

All production and maintenance employees, including leadpersons, electrician, janitor, plant clerical employees, tool room clerk, warehouse employees and wood fabrication employees, employed by the Employer at its Gulfport, Mississippi facility; excluding office clerical employees, draftsmen, computer operators, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by the Act.

WE WILL make employees in the above-described bargaining unit whole for losses suffered because of our unlawful action in withholding contributions on their behalf to the New Orleans Sheet Metal Workers Health and Welfare Fund.

WE WILL, upon written request from Sheet Metal Workers International Association, Local No. 11, rescind the insurance plan in effect under our collective-bargaining agreement with that Union, and will immediately reestablish the plan under the New Orleans Sheet Metal Workers Health and Welfare Fund by making retroactive contributions entitling unit employees to 6 months of future coverage commencing from the day following receipt of the Union's request, and will continue making such payments until we either bar-

[10] Although employees qualify by working at least 350 hours during each preceding 6-month period, the plan provides a means whereby employees may be qualified even though they did not work the full 350 hours. Therefore, all employees and former employees should receive the above-mentioned notice. Former employees qualifying for benefits under the Fund may, of course, be entitled to damages for losses incurred as much as 6 months after termination of their employment with Respondent, as the Fund plan provides for future coverage regardless of whether the individual remains employed by the contributing employer on the basis of contributions made during his employment.

[11] We agree with the Administrative Law Judge that this is not an appropriate case for the granting of attorney's fees or litigation expenses.

gain to a new agreement on this subject with the Union or reach a bargaining impasse.

WE WILL notify, in writing, all persons employed in the bargaining unit after July 10, 1979, of their entitlement to damages for loss of benefits.

TURNBULL ENTERPRISES, INC.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard on September 22 and 23, 1980, in Gulfport, Mississippi. The charge was filed on November 14, 1979. The complaint, which issued on February 20, 1980, alleges that Turnbull Enterprises, Inc. (Respondent), as successor to a Gulfport employer whose production and maintenance employees were represented by the Sheet Metal Workers International Association, Local No. 11, Charging Party (Union), unilaterally discontinued payment of unit employee contributions to the New Orleans Sheet Metal Workers Health and Welfare Fund (Intervenor).

Upon the entire record, my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Charging Party, the Intervenor, and Respondent, I hereby make the following:

FINDINGS OF FACT

I. THE EVIDENCE[1]

The alleged violations arise out of a successorship situation.

During May 1975 the Union was certified as exclusive bargaining agent for unit employees[2] of Frigitemp. Subsequently, the Union and Frigitemp entered into successive collective-bargaining agreements effective from July 1, 1975, through June 30, 1978, and from July 1, 1978, through June 30, 1981. However, in 1978 Frigitemp filed a petition in bankruptcy. Thereafter, Frigitemp continued to operate its Gulfport facility as a "debtor in possession" until it was adjudicated bankrupt in May 1979. From May until July 10, 1979, a trustee appointed by the bankruptcy court operated the Gulfport facility.

The collective-bargaining agreement in effect among the above-mentioned employees of Frigitemp during 1979 provided, among other things, for Frigitemp to make contributions in accordance with an established formula to the Intervenor herein in order to provide medical, hospital, and disability benefits to unit employees.[3]

Pursuant to a bill of sale dated July 10, 1979, Respondent purchased the Gulfport facility formerly held by Frigitemp and, on or about July 17, 1979, proceeded to operate the plant with substantially the same work force. In that regard, Respondent admitted in its answer that it has since on or about July 17, 1979, operated the Gulfport facility as a successor employer within the meaning of *N.L.R.B.* v. *Burns International Security Services, Inc., et al.*, 406 U.S. 272 (1972).

Several employees testified that while they were working at the plant on July 10, 1979, the employees were called into an assembly area where they were addressed by Joe Sanchez. Sanchez was employed as plant superintendent by the predecessor employer and continued in that position following the takeover by Respondent. According to the testimony, Sanchez informed the employees that the Company had been sold and that all employees were being terminated. However, Sanchez told them that the employees would be rehired.[4] Subsequently, on

[1] Respondent, which is engaged in the business of manufacturing maritime furniture at its Gulfport, Mississippi, facility, admitted the commerce allegations in the complaint. On the basis of that admission, I find that Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

[2] The complaint alleges, Respondent admits, and I find that the below-described unit constitutes an appropriate bargaining unit and is the unit for which the Union was certified:

> All production and maintenance employees, including leadpersons, electrician, janitor, plant clerical employees, tool room clerk, warehouse employees and wood fabrication employees, employed by the Employer at its Gulfport, Mississippi facility; excluding office clerical employees, draftsmen, computer operators, guards and supervisors as defined in the Act.

[3] The collective-bargaining provision concerning the Health and Welfare Fund appears at art. XXX and reads as follows:

> ARTICLE XXX—Health and Welfare
>
> Section 1. Effective July 1, 1978, the employer shall pay monthly into the New Orleans Sheet Metal Workers' Health and Welfare Fund for the purpose of providing for the benefit of employees, their families and dependents, medical and hospital care, unemployment benefits or life insurance, disability and sickness insurance or accident insurance, under the terms and conditions of the declaration of trust of the said Fund dated January 1, 1963, a sum equal to fifty-five cents ($.55) per hour for each hour of work performed by employees covered under this Agreement, and as provided in Article VIII-A of the Standard Form of Union Agreement between Sheet Metal Workers Local Union No. 11 and Sheet Metal Contractors Association of New Orleans, Inc. and Individual Contractors who are signatory hereto effective August 1, 1977, terminating July 31, 1980.
>
> Effective on August 1, 1978, 60 cents, effective on August 1, 1979, 65 cents, and effective on August 1, 1980, 70 cents (if applicable).
>
> Section 2. The failure of an individual employer to pay the above amounts or to pay to the Union monthly the dues check-off provided for in this Agreement shall constitute a breach of this Agreement, and this Agreement may, at the option of the Union, be cancelled as to any employer who is fifteen (15) days or more delinquent in making of any said payments. For the faithful performance of his obligation to make said payment, each employer hereunder within fifteen (15) days after signing of this Agreement shall post with the Union a Bond in the amount of twenty-five thousand dollars (25,000.00) for the benefit of any fund, trust or person in interest, to guarantee and secure payment of said amounts.
>
> Section 3. Any employer delinquent more than fifteen (15) days in the making of the above provided payment shall be charged liquidated damages of ten percent (10%) of the said payments due which shall be collectable by the party to whom the payment is due plus attorneys' fees incurred in connection with such collection in addition to the above stated sum and the payment of which shall likewise be secured by the bond provided for hereinabove.

[4] Four employees testified regarding Sanchez' remarks on July 10. Testimony of employee Frazier was that Sanchez told them that most of the employees would be called back by the new employer to do the same jobs. Employee Ladner recalled that Sanchez said that he hoped there would be more work and all the employees would be rehired. Employee Waltman recalled that Sanchez said some of the employees would be coming back—"eventually, all of us would be coming back." Employee Hickman testified that Sanchez said that all the employees would be called back in just a few days. Sanchez did not testify.

July 10, according to unrebutted testimony of employees, they were told, by supervision, to leave their toolboxes at the plant because they would be called back to work.

During the week of July 17, 1979, 68 bargaining unit employees were hired back. All 68 of those employees had previously worked for the predecessor employer. Respondent continued to reemploy former employees of the predecessor employer during the month of July. All those employees rehired during July, with the exception of four, were reemployed at the same wage rate which they had received at the time of their termination by the predecessor employer.

By telegram dated July 10, 1979, the Union made a demand upon Respondent that Respondent recognize and bargain with it concerning wages, hours, and working conditions as representative of the unit employees. The telegram was received by Respondent on July 10. By letter dated July 16, 1979, Respondent agreed to meet with the Union.

On July 16, 1979, the Union's president and business manager, Stanley Gaudet, had a telephone conversation with Respondent's president, Louis Esposito. During that conversation Esposito informed Gaudet that he was willing to sit down and discuss the contract with the Union. According to the testimony of Stanley Gaudet, he asked Esposito about the health and welfare program. According to Gaudet, Esposito replied, "I understand we have a six-month free ride." Esposito asked, "Aren't the employees covered under your health and welfare plan for the next six months?" Gaudet testified that he told Esposito, "They are covered through the end of the year, but they earn that coverage in the first six months of the year. They are earning the coverage for the first part of the next six months in this six-month period. They are always covered like six months in advance." According to Gaudet, Esposito replied, "Well, when we sit down and negotiate, if we owe you something, we will pay you at that time."[5]

Subsequently, Respondent continued to refuse to make contributions to the Health and Welfare Fund. However, Respondent met and negotiated with the Union. Although a strike occurred between November 1 and December 12, 1979, among unit employees, Respondent and the Union reached a collective-bargaining agreement on December 12, 1979. That agreement provided an insurance program for unit employees through a private carrier in replacement of the Health and Welfare Fund. The program incorporated in the parties' December 12 agreement was called "The Innovator."

The General Counsel alleges that, by unilaterally ceasing to make health and welfare contributions, Respondent violated Section 8(a)(5).

II. CONCLUSIONS

Respondent admittedly was the successor employer to Frigitemp (or, more precisely, to the trustee in bankruptcy). The General Counsel contends that Respondent was obligated to negotiate with the Union as exclusive bargaining representative of unit employees before making unilateral changes in terms and conditions of employment. The General Counsel argues, therefore, that Respondent, by discontinuing Health and Welfare Fund contributions for unit employees, without first negotiating with the Union, unilaterally changed a condition of employment. That argument is not founded in the predecessor's collective-bargaining agreement,[6] but in the allegation that the health and welfare provision of that agreement had become an established condition of employment. (See *N.L.R.B.* v. *Burns International Security Services, supra.*)[7]

A. *The Threshold Question*

Although the General Counsel finds support in *Burns, supra*, the *Burns* decision also presents the basis on which the threshold issue in this case is rooted. In *Burns* the successor hired a majority of its unit employees in June 1967, at wages and terms of employment which were different from those established by the predecessor employer. In fact, the successor in that case specifically told its employees when they were hired that it "could not live with" the predecessor's collective-bargaining agreement. Subsequently, on July 12, 1967, the majority union made a bargaining demand on Burns (the successor employer). The Supreme Court found that under the facts of that case the successor was free to set initial terms and conditions of employment. However, the Court went on to state:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor em-

[5] I credit Gaudet's testimony. Gaudet impressed me by his demeanor. His testimony in most respects, including his testimony regarding the July 16 phone conversation with Esposito, was not denied.

[6] In addition to the above argument, the General Counsel also argues that Respondent adopted the predecessor employer's collective-bargaining agreement. I find that the evidence is insufficient to support the General Counsel in that regard.

[7] In that regard, the Supreme Court explained the Board's position in *Burns*, 406 U.S. at 293, 294:

> [T]he Board's opinion stated that "[t]he obligation to bargain imposed on a successor-employer includes the negative injunction to refrain from unilaterally changing wages and other benefits established by a prior collective-bargaining agreement even though that agreement had expired. In this respect, the successor-employer's obligations are the same as those imposed upon employers generally during the period between collective-bargaining agreements." App. 8–9. This statement by the Board is consistent with its prior and subsequent cases that hold that whether or not a successor employer is bound by its predecessor's contract, it must not institute terms and conditions of employment different from those provided in its predecessor's contract, at least without first bargaining with the employees' representative. . . . Thus, if Burns, without bargaining to impasse with the union, had paid its employees on and after July 1 at a rate lower than Wackenhut had paid under its contract, or otherwise provided terms and conditions of employment different from those provided in the Wackenhut collective-bargaining agreement, under the Board's view, Burns would have committed a § 8(a)(5) unfair labor practice and would have been subject to an order to restore to employees what they had lost by this so-called unilateral change.

ployer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 U.S.C. § 159(a). Here, for example, Burns' obligation to bargain with the union did not mature until it had selected its force of guards late in June. The Board quite properly found that Burns refused to bargain on July 12 when it rejected the overtures of the union. It is true that the wages it paid when it began protecting the Lockheed plant on July 1 differed from those specified in the Wackenhut collective-bargaining agreement, but there is no evidence that Burns ever unilaterally changed the terms and conditions of employment it had offered to potential employees in June after its obligation to bargain with the union became apparent. If the union had made a request to bargain after Burns had completed its hiring and if Burns had negotiated in good faith and had made offers to the union which the union rejected, Burns could have unilaterally initiated such proposals as the opening terms and conditions of employment on July 1 without committing an unfair labor practice. Cf. *N.L.R.B.* v. *Katz*, 369 U.S. 736, 745 n. 12 (1962); *N.L.R.B.* v. *Fitzgerald Mills Corp.*, 313 F.2d 260, 272–273, 52 LRRM 2174 (C.A. 2) cert. denied 375 U.S. 834 (1963); *N.L.R.B.* v. *Southern Coach & Body Co.*, 336 F.2d 214, 217 (C.A. 5, 1964). The Board's order requiring Burns to make whole its employees for any losses suffered by reason of Burns' refusal to honor and enforce the contract, cannot therefore be sustained on the ground that Burns unilaterally changed existing terms and conditions of employment, thereby committing an unfair labor practice which required monetary restitution in these circumstances. [406 U.S. at 294, 295–296.]

In the instant case unit employees were told on July 10, 1979, that the employees would be rehired. The certificates of termination of employment of unit employees stated, among other things:

> Frigitemp Marine Div. Plant #3 will cease all operations under the bankruptcy trustee effective July 10, at 3:15 p.m. (plant sold to others). Present employees may be eligible for rehire with the new company (contact personnel department).

Several employees testified that there was no mention that their terms and conditions of employment would be different under Respondent. Moreover, those employees testified that, when they started work again on July 17, they were employed at their old jobs with the same wages.[8] On July 10 employees were told that they could submit their applications for employment with Respondent when they returned on Friday, July 13, to pick up their paychecks. The employees were furnished application forms attached to the termination notices which they were given by their supervisor on July 10. Employee Ronald Ladner testified that he was assisted in completing his employment application by his supervisor (also named Ronald Ladner) and that the supervisor, in response to the employee's question as to what wage rate he should indicate that he desired on his application form, told the employee to put down what he was making with Frigitemp. Ladner also testified that when he returned to work on July 17, the employees took up theirjobs where they had left off on July 10.

The evidence regarding the size of either the predecessor's or Respondent's unit work force is incomplete. However, it is clear that there were no more than 92 unit employees employed by the predecessor employer on July 10. It is also clear that Respondent hired 68 employees during the week of July 17,[9] and all 68 of those employees were employed by the predecessor employer. The record does not show how many more employees of the predecessor employer were hired during July or, subsequently, by Respondent.

Under the circumstances, I find that the unrebutted evidence reflects that Respondent did not take action to set initial terms and conditions of employment which were different from those under the predecessor employer, before incurring an obligation to recognize and bargain with the Union. In that regard, I note, that although some of Plant Superintendent Sanchez' July 10 remarks demonstrated a question as to if, or when, all of the unit employees would be rehired, the evidence shows that Respondent's bargaining unit jobs included only former unit employees of the predecessor. Therefore, there was no question on July 10 as to the continued majority status of the Union. Moreover, the Union's demand for recognition was made by the Union and received by Respondent on July 10. Remarks by Supervisor Sanchez and Ladner during the July 10 through July 13 period led employees to believe that working conditions would not be changed. Ladner told employee Ladner that he should indicate on his employment application that he would accept the same wages he received under the predecessor employer.

Moreover, I do not view as significant Respondent's failure immediately to employ the entire bargaining unit work force of the predecessor, in view of the unrebutted evidence that Plant Superintendent Sanchez told the employees on July 10 that eventually all of the predecessor's employees would be coming back to work.

On July 11, 1979, Stanley Gaudet talked with Superintendent Sanchez. According to Gaudet's unrebutted testi-

[8] As indicated above, the parties stipulated that of all former employees rehired during the entire month of July 1979 only four were employed at wages different from the wages they had received under the predecessor employer. However, the evidence does not reflect that those four, or any other employees, were told on or before July 17 that the wages of the four employees would be different. The record does not reflect how many employees were hired in July. However, 68 were hired during the week of July 17. The evidence does not show that any of those 68 employees received wages different from what they had been paid by the predecessor employer.

[9] There was a 1-week hiatus in production from July 10, when the trustee ceased production, until July 17, when production was commenced by Respondent. In view of the evidence herein which demonstrates that Respondent resumed substantially the same operation with substantially the same work force and supervision, in the same plant, I do not find that the short hiatus affected Respondent's successorship role.

mony, Sanchez told him that "hopefully, all of the people would be hired back within the week or 10 days." Sanchez told Gaudet that the employees would be paid the same pay scale. Gaudet asked if the employees would be hired in seniority, and Sanchez replied that as close as he could, but that Gaudet knew that Sanchez did not like the seniority part of the contract.

Gaudet testified that he had a similar conversation with Sanchez on July 13.

Therefore, the evidence reflects that all communications with the employees and their representative during the week of their termination demonstrated that the bargaining unit employees would be rehired under the same working conditions. Moreover, nothing was said to the employees which would indicate an intent by Respondent to change the terms and conditions of employment. The Board, in a similar case, held:

> In other words, there is nothing to indicate that the employees were aware of any proposed changes in employment benefits at the time Respondent expressed its intent to retain them. Accordingly, as Respondent "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment," (*Spruce Up*, 209 NLRB at 195), we conclude that this case falls within the *Burns* exception. Consequently, Respondent was obligated to bargain with the Union before making any changes in existing terms and conditions of employment. [*Charles Starbuck and Diane Starbuck d/b/a Starco Farmers Market*, 237 NLRB 373, 374 (1978).]

I am convinced that the instant case falls squarely within the "perfectly clear" test outlined in *Burns, supra*. By its language, "[i]n other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he had a duty to bargain with a union,"[10] the Supreme Court demonstrates that the underlying question in applying the "perfectly clear" test is when does the obligation to bargain arise? The evidence herein demonstrates that Respondent's bargaining obligation commenced on July 10, 1979, when the Union made its demand at a time when Respondent fully realized that its anticipated work force was represented by the Union.

Therefore, I find that from July 10, 1979, Respondent had an obligation to bargain with the Union before making unilateral changes in working conditions.

B. *Respondent's Motions*

During the hearing, and again in its brief, counsel for Respondent moved for dismissal. Respondent argues that the hearing should be barred by the doctrine of laches.

The allegations herein allegedly commenced during July 1979. The charges were filed on November 14, 1979. The complaint issued on February 20, 1980. Respondent argues that the hearing, which was originally scheduled for June 11, 1980, was postponed. That postponement, according to Respondent's brief, resulted from the General Counsel's staff considering an appeal by the Charging Party of the refusal of Region 15 to incorporate certain allegations of the charge into the complaint. The hearing was held on September 22 and 23, 1980. Under those circumstances, I hereby deny Respondent's motion to dismiss on the ground of laches. See *Preston H. Haskell Company*, 238 NLRB 943 (1978).

Respondent also argues that the complaint should be dismissed because of the provisions of the Bankruptcy Act. Respondent purchased its Gulfport facility from the trustee in bankruptcy free and clear of all liens and other interests. However, despite the bankruptcy petition of Frigitemp, the trustee continued to make payments to the Health and Welfare Fund in accordance with the practice established by Frigitemp's collective-bargaining agreement with the Union. I find no merit in Respondent's contention. See *Makaha Valley, Inc.*, 241 NLRB 300 (1979).

Respondent also contends a variance exists between the charge and the complaint, in that the charge does not allege "refusal to contribute to the [Health and Welfare] fund." The charge alleges that Respondent violated Section 8(a)(1), (3), and (5) of the Act. The 8(a)(5) allegation contained in the charge broadly alleges that "on or about July 1, 1979, and at all times since that date, it, by its officers, agents and representatives, refused to bargain collectively with Sheet Metal Workers International Association, Local No. 11, a labor organization chosen by a majority of its employees in an appropriate unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment." The Board has continually held that such a charge justifies more specific allegations similar to those made by the General Counsel herein. Therefore, Respondent's motion is denied. See *Griffin Inns, Owner and Operator of Sheraton Motor Inn (Woodhaven, Michigan)*, 229 NLRB 199, fn. 3 (1977).

Respondent also argues that it was prohibited by Section 302(c)(5) from making contributions to the Health and Welfare Fund because it was not party to a collective-bargaining agreement requiring such contributions. In *Wayne's Olive Knoll Farms, Inc., d/b/a Wayne's Dairy*, 223 NLRB 260, 264 (1976), the Board agreed with Administrative Law Judge Boyce's holding that Section 302(c)(5) "was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process. . . . Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers," and that amendment was not intended to preclude an employer's payment into a fund for the benefit of its employees, even though the collective-bargaining agreement had expired. I find the situation herein is similar to that in *Wayne's Dairy*. Respondent's contention in this regard is hereby rejected. See *Starco Farmers Market, supra*.

C. *The Alleged Unilateral Change*

The evidence is undisputed that Respondent failed to make contributions on behalf of its unit employees to the Health and Welfare Fund. The collective-bargaining

[10] *N.L.R.B.* v. *Burns International Security Services, supra.*

agreement of Frigitemp required such contributions and both Frigitemp and, subsequently, the trustee made contributions in accordance with the collective-bargaining agreement until the Frigitemp operations ceased on July 10, 1979.

However, Respondent contends that the mere failure to make contributions to the Health and Welfare Fund does not qualify as a unilateral change in terms and conditions of employment. Respondent argues that the only true measure of whether its actions constitute a unilateral change is to determine what, if any, effect its actions had on employees. In that regard, Respondent contends that the employees suffered no detriment by Respondent withholding health and welfare contributions.

Respondent bases its argument on the unique character of the Health and Welfare Fund. In accordance with the Fund's plan, employees qualified for coverage under the plan during the last 6 months of 1979 by working for the predecessor employer during the first 6 months of 1979. Unit employees of Frigitemp, or the trustee, who worked at least 350 hours between January 1 and June 30, 1979, were qualified for benefits under the Fund from July 1 through December 31, 1979, regardless of whether Respondent made contributions to the plan.

Therefore, Respondent argues, since its failure to contribute would not have affected any of the employees covered until January 1, 1980, there was no change in working conditions because another plan, The Innovator, was substituted on December 12, 1979, pursuant to its collective-bargaining agreement with the Union. From December 12, employees were covered under The Innovator.

However, the other parties argue that Respondent's unilateral refusal to make contributions had an impact on employees' working conditions. The Intervenor, in its brief, points to several differences between the Health and Welfare Fund's plan and The Innovator which, according to the Intervenor, unlawfully affect unit employees' working conditions.

I am persuaded that Respondent's actions unilaterally affected unit employees' working conditions. Regardless of whether The Innovator or the Health and Welfare Fund appeared to Respondent to offer more to employees, it remains the employees', not Respondent's, right to make that determination. If the employees, or their representative, determine that the Health and Welfare Fund is better suited to their needs, then the employees should have an opportunity to bargain before the Health and Welfare Fund is abandoned.

When Union President Gaudet talked to Respondent President Esposito on July 16, Esposito admitted that Respondent would not make contributions to the Health and Welfare Fund. Esposito told Gaudet, "When we sit down and negotiate, if we owe you something, we will pay you at that time."

Subsequently, the parties met and negotiated on various occasions from August through December 12, 1979. Eventually, a collective-bargaining agreement was reached on December 12.

However, Respondent refused to incorporate the Health and Welfare Fund's plan into the contract. As time wore on, during those negotiations, the total amount of contributions which Respondent had failed to make to the Health and Welfare Fund increased. That fact added to the overall cost of a potential collective-bargaining agreement and thereby placed the Union in an increasingly difficult position regarding reinstitution of the Fund's plan.

Moreover, many of the differences between the Fund's plan and The Innovator present substantive grounds for concern by employees. The evidence demonstrated that, once employees qualified under the Fund during any 6-month period by working 350 hours, that particular employee retained coverage through the following 6-month period regardless of whether his employment continued. Under The Innovator, coverage ceases if employment is terminated.

Under the Fund, appeals are considered by the Fund which includes representatives of employees. The Innovator would involve only employees of insurance companies. Additionally, the evidence showed that there are other differences between the Fund and The Innovator which could reasonably cause concern among employees.

Therefore, I find that Respondent's unilateral withholding of Fund contributions impacted unit employees' working conditions[11] and violates Section 8(a)(5).[12]

CONCLUSIONS OF LAW

1. Respondent, Turnbull Enterprises, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers International Association, Local No. 11, is a labor organization within the meaning of Section 2(5) of the Act.

3. On July 10, 1979, the Union was, and has been at all times since, the exclusive bargaining representative of Respondent's employees in the bargaining unit described below within the meaning of Section 9(a) of the Act. The appropriate bargaining unit is:

> All production and maintenance employees, including leadpersons, electrician, janitor, plant clerical employees, tool room clerk, warehouse employees and wood fabrication employees, employed by the Employer at its Gulfport, Mississippi facility; excluding office clerical employees, draftsmen, com-

[11] *Starco Farmers Market, supra; Joe Costa Trucking Company d/b/a Joe Costa Trucking*, 238 NLRB 1516 (1978); *Bellingham Frozen Foods, a Division of San Juan Packers*, 237 NLRB 1450 (1978).

[12] Respondent argues in its brief that the Union acquiesced in Respondent's actions and its violations were cured by it and the Union's overall conduct. On several occasions during July, Union President Gaudet asked Respondent's representatives, Sanchez and Esposito, about making contributions to the Health and Welfare Fund. During the August 22 negotiation session, Gaudet asked Esposito to start making contributions to the Fund. During negotiations, the Union continued to negotiate toward restoration of the Fund through its November 1 strike until they finally capitulated to Respondent's demand that the Fund be replaced with an insurance company plan on December 12, 1979. Under those circumstances, I find that the Union did not acquiesce in Respondent's withholding Fund contributions. Moreover, I see nothing in either the Union's or Respondent's conduct which cured the violation. In that regard, even though Esposito told Gaudet on July 16, "If we owe you something, we will pay you," I note that Fund contributions were never made.

puter operators, guards and supervisors as defined in the Act.

4. Respondent, by unilaterally withholding contributions on behalf of unit employees to the Health and Welfare Fund, violated Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Since the appropriate remedy for Respondent's unilateral action in discontinuing contributions to the Health and Welfare Fund is to reinstate the *status quo ante*, I recommend that Respondent make whole the employees in the unit by making all Health and Welfare Fund contributions, as provided in the predecessor's collective-bargaining agreement, which have not been paid for the period beginning on July 10, 1979, and extending until agreement was reached on December 12, 1979.[13] *Starco Farmers Market, supra; Joe Costa Trucking, supra.* Backpay shall be computed in accordance with *Ogle Protection Service, Inc. and James L. Ogle, an Individual*, 183 NLRB 682 (1970).[14]

Additionally, I shall recommend that Respondent be ordered to reinstate the Health and Welfare Fund plan for unit employees, upon written request by the Union. I am convinced that reinstatement of the plan is warranted in view of testimony from Gaudet and Hernandez, which I credit, that they were told during negotiations, by Plant Manager Kolkmeyer, that he (Kolkmeyer) did not want the Fund because the Fund tied the employees too close to the Union. On direct, Kolkmeyer denied that he told the Union that he did not want the Fund because it tied the employees to the Union, but he did testify that he objected to the Fund because it was controlled by the Union. Later, on direct, Kolkmeyer admitted that he could have used the phrase "tied in" in referring to the Union having control. Moreover, on cross by the General Counsel, Kolkmeyer was asked to explain precisely what it was about union control that bothered him. Kolkmeyer's response to the General Counsel's questions revealed that the source of his concern was the Union's, rather than Respondent's, contact with employees during the Fund's administration. In view of Kolkmeyer's testimony and the testimony of Gaudet and Hernandez and employee Eugene Frazier, I am convinced that Respondent found the Fund objectionable because of the opportunities it presented for the employees to maintain close contact with their Union. I am also persuaded that Kolkmeyer told the Union and employees on the union negotiating committee that he did not want the Fund because the Fund tied the employees too close to the Union. In view of the above evidence regarding Respondent's motivation in rejecting the Fund, and in view of the obvious harmful effect Respondent's illegal discontinuation of the Fund contributions had on reinstitution of the Fund during negotiations, I am persuaded that the Fund must be instituted by Respondent in order fully to restore the *status quo ante. Bastian-Blessing, Division of Golconda Corporation*, 194 NLRB 609, 614 (1971).

Since this remedy would have the effect of qualifying all persons employed in the bargaining unit during the period beginning July 10, 1979,[15] for benefits under the Health and Welfare Fund, I shall recommend that Respondent be required to take appropriate action to notify, in writing, all employees, and former employees that so qualified, of their entitlement to those benefits.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to

[13] Even though I have recommended below that Respondent be required to reinstate the Fund plan for unit employees, I have limited direct reimbursement to the date the parties agreed to a collective-bargaining agreement (December 12, 1979). Since the employees were covered both under The Innovator and, in accordance with my recommendations herein, the Fund, until July 1, 1980, and subsequently, by The Innovator alone, I find no justification for a broad order requiring what would constitute double premiums and coverage from December 12, 1979. However, if compliance proceedings are necessitated, the General Counsel may, upon showing that specific unit employees suffered actual damage in loss of benefits at some point after June 30, 1980, recover those damages in the form of backpay to the particular employee involved; provided, however, that Respondent may, at its discretion, elect to continue contributions to the Fund beyond December 12, 1979, in lieu of compensating employees for loss of benefits under the Fund. See *Merryweather Optical Company*, 240 NLRB 1213 (1979). However, Respondent's election to contribute to the Fund or reimburse employee losses shall not affect the Fund's right to additional amounts. See fn. 14 below. In measuring actual damages, employees should be reimbursed for actual cost to the extent those costs would have been paid by the Fund minus costs which were actually paid by Respondent's insurance.

Although unit employees struck Respondent on November 1, 1979, the evidence does not establish a basis for terminating Respondent's obligation to make Health and Welfare Fund contributions at that time. Even if an impasse existed on November 1, Respondent took no action at that time which was consistent with its rejected offers to the Union. The record failed to prove that Respondent instituted The Innovator plan for unit employees until December 12, 1979, when it reached agreement with the Union. *Falcon Tank Corp.*, 194 NLRB 333 (1971).

I find no basis to grant litigation expenses herein. I do not view Respondent's defenses to be "patently frivolous." Although a case may be made that the issues herein are not "dependent upon resolutions of credibility" (*Heck's Inc.*, 215 NLRB 765 (1974)), the Board in *Heck's* did not imply that the "credibility" test was the exclusive measure in determining whether to award litigation expenses. Other questions are present here, including especially those arising because of the unique nature of the Fund's 6-month provisions, which give rise to "debatable" issues.

[14] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accord with *Merryweather Optical Company, supra*, I recommend against the addition of interest at a flat rate, at this, the adjudicatory stage, on these unlawfully withheld fund payments. It should be left "to the compliance [stage] the question whether Respondent must pay any additional amounts into the [Health and Welfare Fund] in order to satisfy [this] 'make-whole' remedy. These additional amounts may be determined . . . by reference to provisions in the documents governing the [F]unds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of the funds withheld, additional administrative costs, etc., but not collateral losses." *Merryweather Optical Company, supra*, 240 at 1216, fn. 7. In computing such amounts, the basis for computation would run from July 10, 1979, to the date upon which Respondent fully complies with the terms of this recommended Order.

[15] Although employees qualify by working at least 350 hours during each preceding 6-month period, the plan provides a means whereby employees may qualify even though they do not work the full 350 hours. Therefore, all employees and former employees should receive the above-mentioned notice.

Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[16]

The Respondent, Turnbull Enterprises, Inc., Gulfport, Mississippi, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally changing established terms and conditions of employment of the employees in the bargaining unit for failing to contribute to the Health and Welfare Fund established by the predecessor employer's collective-bargaining agreement with the Union in derogation of the bargaining obligation imposed by the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make whole the employees in the appropriate unit in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Upon written request from the Union, and in the manner set forth in the section of this Decision entitled "The Remedy," rescind the current plan under its collective-bargaining agreement with the Union, and immediately reestablish the plan under the New Orleans Sheet Metal Workers Health and Welfare Fund.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant or necessary to facilitate the determination of the amounts due to employees under the terms of this Order.

(d) Post at its Gulfport, Mississippi, place of business copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuos places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."